ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

July 24, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, CC Docket No. 97-146; Access Charge Reform, CC Docket 96-262

Dear Ms. Salas:

Please find attached an original and four copies of the Reply Comments of the Association for Local Telecommunications Services with regard to the Commission's Public Notice in the above-referenced proceeding.

Sincerely,

Teresa K. Gaugler

cc: ITS, Inc.
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)	CC Docket No. 97-146
Access Charge Reform	)	CC Docket No. 96-262

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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July 24, 2000

SUMMARY

ALTS urges the Commission not to take any action in this proceeding without first independently determining that a widespread problem exists with regard to unreasonable CLEC access charges. Having already determined that the ILEC rates do not constitute the proper benchmark for CLEC access rates, the Commission must not be swayed by the IXCs' bald assertion that CLEC rates are unreasonable and must reject AT&T's proposal to require CLECs with rates higher than the ILEC to detariff those access services. There is no reason for carriers that charge reasonable rates to be loaded with the burden of mandatory detariffing that would require individual contract negotiation with hundreds of IXCs. Doing so would increase those carriers' costs and hamper their ability to compete.

Mandatory detariffing will not provide further benefits to the industry or to consumers. It will not facilitate the introduction of new services, stimulate competitive entry, or lower transaction costs for carriers. New entrants already endure negotiations with ILECs to secure interconnection arrangements in order to provide competing local service. Placing the additional burden on them of negotiating with every IXC would dramatically increase CLEC costs and time to enter the market. Furthermore, if IXCs are permitted to dictate unreasonably low CLEC access charges due to their greater bargaining power during negotiations, then their incentive to enter the market and provide competing access services is greatly diminished.

Any system that leaves smaller carriers at the mercy of larger carriers without any regulatory oversight or protection is fraught with opportunities for abuse and anti-competitive tactics. Even the IXCs that have changed their earlier positions recognize

these inherent flaws in a mandatory detariffing regime. As the Commission acknowledged were AT&T's tactics during negotiations with MGC, the larger IXCs' strategy would likely be to either coerce those carriers into accepting their proposed rate or refuse to interconnect with those carriers, thereby manipulating the access market as well as the local exchange market, for those CLECs would be unable to maintain their foothold in the local exchange market without the ability to provide their customers with the option of presubscribing to the larger IXCs for their long-distance services.

Permitting IXCs to refuse interconnection with CLECs would allow opportunities for serious abuses by the IXCs, especially those that provide local exchange services in a market. In essence, those IXCs, who would have the incentive to undermine competitive entry, would have the ability to shut out CLECs from providing local service in a market by dictating which end users could receive their own long distance services. The same anti-competitive behavior could occur at the hands of the BOCs as they receive authority to provide interLATA interexchange services. Consumers would have no choice but to select the ILEC or the IXC as their local exchange carrier in order to have guaranteed access to their preferred long-distance carrier. That is clearly inconsistent with the Commission's pro-competitive goals. Thus, the Commission should clarify that IXCs who believe a CLEC's access charges are unreasonable may not employ self-help methods by refusing to pay or refusing traffic. The proper venue for such disputes is a complaint proceeding where the Commission, *not* the IXC, determines on a case-by-case basis whether a particular CLEC's rates are unreasonable.

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REPLY COMMENTS OF THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS"), pursuant to the Public Notice ("Notice") in the above captioned proceedings, released June 16, 2000, hereby files its reply comments on the detariffing of competitive local exchange carrier ("CLEC") interstate access services.

INTRODUCTION

ALTS again urges the Commission not to take any action in this proceeding without first independently determining that a widespread problem exists with regard to unreasonable CLEC access charges. Nothing submitted in the record of this proceeding provides a basis for the Commission to make that determination. The Commission should not take the interexchange carriers' ("IXCs'") bald assertions and characterization of the "problem" at face value because the Commission has already found in *Sprint v. MGC*[1] that their baseline rate (that of the ILEC) is not the appropriate benchmark for determining that a CLEC's rates are unreasonable. There is no reason for carriers that

[1] *Sprint Communications Company v. MGC Communications, Inc.*, File No. EB-00-MD-002 (rel. June 9, 2000), ¶ 1.

charge reasonable rates to be loaded with the burden of mandatory detariffing that would require individual contract negotiation with hundreds of IXCs. Doing so would increase those carriers' costs and hamper their ability to compete. Thus, the Commission should continue to address complaints on a case-by-case basis and should not burden the industry with a mandatory detariffing policy.

I. THE COMMISSION SHOULD NOT HAMPER CLECs' ABILITY TO COMPETE BY IMPOSING GREATER BURDENS ON THEM THROUGH A MANDATORY DETARIFFING POLICY.

AT&T continues to oppose a mandatory detariffing policy throughout the industry, recognizing the significant burden imposed on access customers and CLECs to negotiate contractual agreements for every access service.[2] AT&T debunks arguments that mandatory detariffing would provide further benefits, aptly noting that "[u]nlike in the Commission's recent consideration of mandatory detariffing of [IXC] services, there is thus no 'customer interest' basis here to impose mandatory detariffing on all CLEC access services."[3] Furthermore, AT&T echoes ALTS' warning that mandatory detariffing unfairly disadvantages CLECs *vis a vis* their ILEC competitors: "Providing entrenched incumbents with a further cost advantage over new competitive entrants cannot be squared with the Commission's objectives in these proceedings."[4]

Contrary to the claims of Ad Hoc Telecommunications Users Committee ("Ad Hoc"),[5] mandatory detariffing will neither facilitate the introduction of new services nor stimulate competitive entry. As ALTS explained in its initial comments, tariffing

[2] AT&T Comments at 8.
[3] *Id.*
[4] *Id.* (citation omitted).
[5] Adhoc Telecommunications Users Committee Comments at 3.

provides a cost-effective and efficient means of providing services, and requiring individual negotiation with hundreds of IXCs for every service will delay and hamper competitive entry. In fact, if IXCs are permitted to dictate unreasonably low CLEC access charges due to their greater bargaining power during negotiations, then their incentive to enter the market and provide competing access services is greatly diminished. Contrary to Ad Hoc's assertion, detariffing will not lower transaction costs for carriers. The costs of preparing and filing tariffs for access services is quite minimal compared to the resources and funds that would be needed to negotiate interconnection agreements with hundreds of IXCs.

New entrants already endure negotiations with ILECs to secure interconnection arrangements in order to provide competing local service. Placing the additional burden on them of negotiating with every IXC would dramatically increase CLEC costs and time to enter the market. The General Services Administration ("GSA") appreciates the pitfalls of a mandatory detariffing policy and opposes its adoption, stating that "[t]ariffs for services provided by competitive LECs to IXCs serve a vital function in promoting *more* competition" rather than acting as a barrier to competition.[6] GSA is concerned about the consumer impact that would result from delays in negotiations and from ongoing legal challenges, highlighting that these "may seriously limit communications options."[7] "Rather than a general reduction in access charges, the principal result would [be] a reduction in opportunities for effective local competition. Limitations on opportunities for competition are contrary to the interests of end users (business as well

[6] GSA Comments at 3 (emphasis in original).
[7] *Id.* at 4.

as residential) in all markets."[8] Clearly, now is not the time to burden the industry with mandatory detariffing, which could further hinder the spread of competition.

II. COMPETITION WILL SUFFER IF CLECs ARE LEFT AT THE MERCY OF IXCs DURING INDIVIDUAL CONTRACT NEGOTIATIONS.

With total disregard for the Commission's ruling in *Sprint v. MGC*, the IXCs continue to characterize CLEC access rates that are higher than the ILEC's rate as unreasonable and/or excessive.[9] The Commission's rejection of this blanket argument is irrefutable, thus knowing that the underlying basis for the IXCs' characterization is unreasonable and invalid, the Commission must not be swayed by their sweeping characterization of those rates. Furthermore, having already determined that the ILEC rates do not constitute the proper benchmark for CLEC access rates, the Commission must find that there is no basis for AT&T's proposal to require CLECs whose rates are higher than the ILEC to detariff those access services on that basis alone. The Commission has acknowledged that there may be valid economic reasons for CLEC access rates to be higher than the ILEC's rate and that those higher rates are not *per se* unreasonable, thus it should not subject those CLECs to unfair and discriminatory regulatory treatment.

The large IXCs have clearly stated their position on the "acceptable" level of CLEC access charges, and the Commission must realize that there will be no negotiating between those carriers and most CLECs, especially smaller new entrants. The IXCs' strategy would likely be to either coerce those carriers into accepting their proposed rate or refuse to interconnect with those carriers, thereby manipulating the access market as

[8] *Id.* at 6.

well as the local exchange market, for those CLECs would be unable to maintain their foothold in the local exchange market without the ability to provide their customers with the option of presubscribing to the larger IXCs for their long-distance services. The Commission expressly acknowledged such tactics by AT&T in its negotiations with MGC: "it appears that AT&T may have attempted to use the threat of termination of MGC's access service – or the withholding of payment for the service it continued to receive – as a means of exerting pressure on MGC in the parties' ongoing rate negotiations."[10] Knowing their propensity to utilize such tactics, the Commission should not place such power in the hands of the IXCs by adopting mandatory detariffing.

Even the IXCs that have changed their earlier positions recognize the flaws inherent in mandatory detariffing of CLEC access charges. Sprint offers what must be described as grudging support for mandatory detariffing, stating that it "*may* be a constructive step."[11] This is by no means resounding support for such a policy, especially when Sprint goes on to discuss its grave concerns about the public policy consequences of requiring bilateral negotiations between parties with unequal bargaining power.[12] ALTS shares Sprint's apprehension that such a process favors larger carriers over smaller competitors and that those larger carriers would essentially control the negotiations.[13] Even WorldCom recognizes the potential for discriminatory action among carriers. ALTS agrees that unequal bargaining power can lead to discriminatory and anti-competitive behavior but disagrees that Sprint's and WorldCom's proposals, which would require public disclosure of and the ability to opt-in to negotiated agreements

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[9] AT&T Comments at 3 n.3; Sprint Comments at 2.
[10] *MGC v. AT&T*, File No. EAD-99-002 (rel. Dec 28, 1999), ¶ 9.
[11] Sprint Comments at 3 (emphasis added).
[12] *Id.*

between other carriers, would cure the harms of a mandatory detariffing policy. CLEC cost structures differ from one another, thus they are not optimally situated to opt-in to agreements between other CLECs and IXCs. More importantly, though, larger IXCs who possess market power may force a CLEC to provide services at unprofitable – even below cost – rates. No other CLEC would choose to opt-in to such a coercive agreement, thus there is no protection provided to CLECs by the disclosure or the opt-in proposals.

Any system that leaves smaller carriers at the mercy of larger carriers without any regulatory oversight or protection is fraught with opportunities for abuse and anti-competitive tactics. GSA agrees that such a policy has inherent problems: "[e]stablishment of these rates, terms and conditions should not be left to an amorphous bargaining process. In short, removal of all regulatory surveillance – except through a complaint process – makes it a practical impossibility to implement the requirements for efficient interconnections."[14] Continued disputes over these issues and delays in establishing interconnection agreements will have a dramatic impact on consumers by increasing consumer confusion in the marketplace and diminishing consumer choice. ALTS agrees with Sprint: "[i]n short, even with mandatory detariffing of CLEC access charges, [] it will be necessary for the Commission ultimately to decide the reasonable terms of interconnection between CLECs and IXCs and to monitor and enforce the statutory prohibition against unjust discrimination."[15] Thus, the Commission should not view mandatory detariffing as a solution to remove itself from these disputes.

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[13] *Id.*
[14] GSA Comments at 4.
[15] Sprint Comments at 4.

III. THE COMMISSION SHOULD AFFIRM THAT IXCs HAVE THE DUTY TO INTERCONNECT WITH CLECs AND PAY FOR ACCESS SERVICES RECEIVED.

In its comments, AT&T attempts to re-argue its position rejected by the Common Carrier Bureau in *MGC v. AT&T*,[16] where the Bureau found that AT&T need not affirmatively place an order for a CLEC's access service in order to be responsible for paying access charges.[17] The Bureau found that by agreeing to accept CLEC customers as presubscribed to its long distance service and without working with the CLEC and the customers to transfer the customers to another IXC, AT&T had in fact accepted those access services and was liable for payment according to MGC's tariffed rate.[18] The Commission upheld this finding in no uncertain terms:

> We reject the notion that an interexchange carrier may withdraw its long distance service that it provides to an entire class of customers, then wash its hands of the matter, as AT&T attempted to do in this case. AT&T voluntarily began providing interexchange service to MGC's local service customers, taking access service from MGC's tariffed rates. Having done so, AT&T may not simply terminate its access arrangement with MGC in a way that suddenly would leave thousands of blameless customers without the service that they have been receiving through the two companies. AT&T's apparent attempt to do so in this case was unjust and unreasonable.[19]

AT&T clearly did not get the Commission's message in *MGC v. AT&T*, as evidenced by its continued assertion that an IXC may merely "disclaim any intention to so order [CLEC access services]" and be released from the obligation to pay for those access services.[20] The Commission must make clear here that an IXC that continues to allow a

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[16] AT&T Comments at 6.
[17] *MGC Communications v. AT&T*, File No. File No. EAD-99-002 (rel. July 16, 1999), ¶ 26-27.
[18] *Id.*
[19] *MGC Communications v. AT&T*, File No. File No. EAD-99-002 (rel. Dec 28, 1999), ¶ 7.
[20] AT&T Comments at 6.

CLEC's customers to presubscribe to its long distance service and that receives traffic from that CLEC *has* ordered the CLEC's access service and is responsible for payment at the CLEC's tariffed rates.

ALTS strongly opposes AT&T's call for the Commission to "reaffirm that under existing law IXCs have no obligation to order access from any CLEC."[21] Such a policy would allow IXCs to block calls to and from CLEC customers and would violate the provisions of the Act requiring interconnection. ALTS agrees with Focal that "any 'market-based' approach that involves the possibility of uncompleted calls is unacceptable for that reason alone."[22] Furthermore, this policy would encourage discriminatory treatment of CLECs by allowing an IXC to refuse access service from any CLEC while it agrees to accept service from any ILEC, regardless of the terms and conditions of those services. ALTS agrees with WorldCom that "[i]f an IXC agrees to accept the access services of one CLEC in a particular geographic area, refusal to accept services from another CLEC operating in the same area on similar terms and conditions, may constitute a discriminatory practice under the Communications Act and the Commission's rules."[23] And finally, such a policy would allow opportunities for serious abuses by IXCs, especially those that provide local exchange services in a market. In essence, those IXCs, who would have the incentive to undermine competitive entry, would have the ability to shut out CLECs from providing local service in a market by dictating which end users could receive their own long distance services. The same anti-competitive behavior could occur at the hands of the Bell Operating Companies ("BOCs") as they receive authority to provide interLATA interexchange services. By

[21] *Id.* at 8 n. 18.
[22] Focal Communications Comments at 9.

refusing to interconnect with competing CLECs, the BOCs would have additional means of thwarting local competition. Global Crossing accurately depicts the negative impact on consumers and ultimately on the growth of competition by stressing that allowing IXCs to refuse to accept access services from a CLEC "would be confusing to consumers, [and] would also not bode well for local exchange competition. Consumers would soon become aware that the only sure way to be able to choose their preferred long-distance carriers would be to select the ILEC as their local provider."[24] This is clearly inconsistent with the Commission's pro-competitive goals.

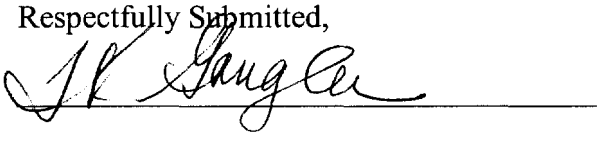
For the reasons discussed above, ALTS supports Winstar's request that the Commission clarify that IXCs who believe a CLEC's access charges are unreasonable may not employ self-help methods by refusing to pay or refusing traffic.[25] The appropriate forum for addressing these concerns is a complaint proceeding where the Commission, *not* the IXC, determines on a case-by-case basis whether a particular CLEC's rates are unreasonable.[26] The Commission should make clear that IXCs are not the arbiters of Section 201(b), and thus they may not unilaterally determine the reasonableness of another carrier's rates and then act anti-competitively based on that determination.

[23] WorldCom Comments at 6.
[24] Global Crossing Comments at 7.
[25] Winstar Comments at 5-6.
[26] *Id.*

CONCLUSION

For the foregoing reasons, the Commission should not adopt mandatory detariffing of CLEC interstate access services because it does not meet the public interest. Such a policy would unfairly disadvantage CLECs *vis a vis* both the IXCs and the ILECs, which would have a dramatic negative impact on competitive entry and consumer choice. Moreover, mandatory detariffing will not solve the underlying disputes between IXCs and CLECs, thus the Commission will ultimately have to address these issues.

Respectfully Submitted,



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